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In The
Supreme Court of The United States
October Term 1996

BUSH & BURCHETT, INC.,
Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR; THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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IN THE SUPREME COURT OF
THE UNITED STATES

BUSH & BURCHETT, INC.	)	
	)	
Petitioner	)	
	)	
vs.	)	
	)	
ROBERT B. REICH,	)	
SECRETARY OF LABOR;	)	
THE OCCUPATIONAL SAFETY	)	
AND HEALTH REVIEW	)	Petition for Writ of
COMMISSION	)	Certiorari of the
	)	United States Court
	)	of Appeals for the
Respondents	)	Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI

BBI respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not published and is reproduced in the Appendix ("App.") attached to this Petition at App.,A. The Decision and Order of the Administrative Law Judge of the Occupational Safety and Health Review Commission (Jurisdictional Issue) is reproduced at App. B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are the Occupational Safety and Health Act of 1970. 29 U.S.C.§ 651 et. seq. and the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 et. seq.

STATEMENT OF CASE
A. OVERVIEW AND SUMMARY

This case arises from the issuance of three citations by the Secretary of Labor ("Secretary") against Bush & Burchett, Inc., ("BBI") for violations of the Occupational Safety and Health Act of 1970[1] ("The Act"). The violations were issued during two separate inspections at a bridge construction site. BBI contested each citation and the two cases were consolidated. BBI argues that the Occupational Safety and Health Review Commission ("OSHRC") erred in upholding the citations because the Mine Safety and Health Act ("MSA"), 30 U.S.C. § 801 et seq., had preempted the Occupational Safety and Health Administration's ("OSHA") jurisdiction. Pursuant to section 11 (a) of "The Act"[2] BBI appealed directly to the United States Court of Appeals for the sixth circuit, which affirmed the "OSHRC".

This petition involves a direct conflict among the circuits as to a threshold rule of safety jurisdiction between OSHA and MSHA.

The third[3], fourth[4], ninth[5], and DC[6] Circuits have held that OSHA lacked jurisdiction over working conditions already subject to regulation by MSHA.

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[1] 29 U.S.C. § 651 et seq.

[2] 29 U.S.C. § 660(a).

[3] Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm'n, 969 F.2d 1501 (3d. Cir. 1992).

Pursuant to the Federal Mine Safety and Health Act of 1977 (MSA) [7], mine safety and health enforcement was transferred from the Department of Interior to the newly-created Mine Safety and Health Administration (MSHA) within the Department of Labor. Under the provisions of the new law, the Metal and Non Metallic Mine Safety Act was repealed and a single mine safety and health law was established for all mining operations under an amended coal Mine Health and Safety Act. The existing coal and non-coal safety and health standards were retained.

According to an OSHA-MSHA Interagency Agreement [8] an employer will be subject to MSHA rather than OSHA if it is engaged in "mining" [9]. The Secretary of Labor has no jurisdiction under OSHA to promulgate or

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[4] United Energy Service, Inc. v FMSHA, 35 F.3rd 971 (4th Cir. 1994)

[5] Cyprus Indus, Etc. v. Federal Mine Safety & Health 664 F.2d 1116(9th Cir. 1981).

[6] Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984).

[7] Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 et. seq.

[8] 44 Fed. Reg. 22,827 (1979) See also 48 Fed.Reg. 7469 (1983).

[9] "Mining has been defined as the science, technique, and business of mineral discovery and exploitation... 44 Fed.Reg. 22,829 (1979).

enforce safety standards for which MSHA is exercising authority under those conditions.

By statute, [10] OSHA's safety regulations are preempted where another federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. MSHA is one of the safety agencies which can preempt OSHA. MSHA's jurisdiction covers "each coal mine... and each operator" of a mine. 30 U.S.C. §803; App. E. An "operator" is defined to include "any independent contractor performing construction at such mine." 30 U.S.C. § 802(d); App. D.

Remedial statutes are construed broadly to "best effectuate" the congressional purpose.[11]

A "coal mine" in broadly defined to include more than the normal lay definition of a coal mine.[12]

As the Senate Report stated, in part:

* * *

> "Finally, the structures on the surface or underground, which are

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[10] 29 U.S.C. § 653 (b)(1); App. C

[11] Whirlpool Corp. v. Marshall, 445 U.S. 1, 13, 100 S. Ct. 883,891, 63 L.Ed.2d 154 (1980).

[12] Marshall v. Stout's Ferry Preparation Co., 602 F.2d 589,592 (3rd Cir. 1979): Cert. Denied, 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1980)(sand and gravel preparation plant is a "mine" within the meaning of the act); Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980)(back-yard rock quarry is within the definition of a amine).

> used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine." The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of this Act." [13]

More specifically, by statute, a "coal mine" includes an area of land from which minerals are extracted and private ways and roads appurtenant to an area of land from which minerals are extracted and lands, excavations.... slopes, structures, ... Or other property... on the surface... used in or to be used in ... the work of extracting minerals or the work of storing and loading coal,... and such other work of preparing such coal as is usually done by the operator of the coal mine. 30 U.S.C. § 802 (h)(1) and 802 (i). In this case the coal haul road is a "coal mine" by all of the definitions stated in the MSA.

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[13] S. Rep. No. 95-181, 95th Cong., 1st Sess. 1, reprinted n [1977] U.S. Code Cong. & Ad. News 3401, 3414 (emphasis added).

The broad reach of MSHA has been repeatedly demonstrated. [14] The circuits have developed several standards by which activities are determined to be included within the MSA. The coal haul road at issue here is defined as a "coal mine" by all of these different standards. [15]

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[14] Otis Elevator Co., v. Secretary of Labor, 921 F. 2d 1285 (D.C. Cir. 1990), in which an elevator operator performing periodic service on elevators used in the mine was determined to be subject to MSHA's authority.

[15] In Donovan v. Carolina Stalite Co., 734 F.2d at 1551(D.C. Cir. 1984), which held that a slate gravel processing facility that did not extract the slate it processed was nonetheless a "mine" since it was operationally integrated with a plant subject to MSHA's authority (emphasis added).

In Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501 (3rd Cir. 1992) ("Penelec"), aff'g 11 FMSHRC 1875 (October 1989), the sole issue was whether Mine Act jurisdiction attached to the head drives of conveyors transporting coal to an electric power plant for processing. The court held that "[u]nder the functional analysis we are to employ when giving the 'broadest possible' scope to Mine Act coverage,. . . the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation 'usually done by the operator of a coal mine.'" Id. at 1503 (citations omitted) (emphasis added).

The functional analysis of Penelec was adopted by the court in United Energy Services v. FSHA, 35 F.3d 971 (4th Cir.

1994). In United Energy, coal waste from a refuse pile at a working mine was transported via conveyors to an adjacent electric power plant where it was sized, crushed, and ultimately burned for fuel. 35 F.3d at 973. As in Penelec, the court in United Energy dealt with the issue of whether the coal transportation equipment fell under MSHA jurisdiction. The Fourth Circuit stated that the operator's activities "involve the transportation of coal to the preparation facility and thus are part of the 'work of preparing coal.'" Id. at 975, Citing Penelec, the court upheld the Commission judge's decision sustaining MSHA's jurisdiction. Id. (emphasis added).

In Roberts v. Weinberger, 527 F.2d 600, 601-02 (4th Cir. 1975), and Norfolk & W. Ry. v. Roberson, 918 F.2d 1144, 1147-48 (4th Cir. 1990), cert. denied, 500 U.S. 916, 111 S.Ct. 2012, 414 L.Ed.2d 99 (1991), an employee who transported raw coal from a mining site to a preparation facility where it was processed before being reloaded for shipment was engaged "in the extraction or preparation of coal." The court concluded that the employees' activities were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers. Although delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act, activities which involve the transportation of coal to the

STATEMENT OF THE CASE

B. BACKGROUND

After years of study, Heartland Resources, Inc. ("Heartland"), a wholly owned subsidiary of the Pittston Company, commenced building a large coal mine on 22,000 acres of land in Lincoln County, West Virginia. The

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preparation facility are part of the "work of preparing coal." See also Norfolk & W. Ry. v. Director, OWCP, 5 F.3d 777 (4th Cir. 1993) (holding that locomotive engineer who delivered empty coal cars to coal mine and preparation facility, and transported raw coal to preparation facility was engaged in the preparation of coal).

The "Raw Coal" standard establishes MSHA safety jurisdiction from the time the coal is extracted until and including the time that it is loaded for delivery to distributors and consumers.

In Cyprus Industrial Minerals v. FMSHRC, 664 F.2d 1116(9th. Cir. 1981) the court interpreted the definition of mine very broadly. The court stated that the conventional concept of mining is irrelevant under the MSA. The word "mine" as used in the FMA is much more encompassing than the usual meaning attributed to it. The word "mine" means everything enumerated in the statute. As the bridge, in the instant case, was to be used in the work of "transporting", "storing" and "loading" raw coal. Activities enumerated in the MSA as part of extraction and processing of coal, the bridge meets the definition of a coal mine under this standard.

concept was to build a mine that would produce approximately a million and a half tons of coal per year for sale to a southern utility under a five year contract with a five year renewal option. The goal was to mine seven thousand tons of coal per day. Heartland's plan required building a surface mine (extraction facility) at the top of Bryan Ridge Mountain; building a unit train load-out facility located on the opposite side of the Guyandotte River from the extraction facility; and building a facility to transport the raw coal from the extraction facility to the load-out facility. The difficult part of the plan was how to transport the coal from the extraction facility to the load-out facility. Heartland considered several different options: (1) use the existing road and bridge system; (2) build a belt line to carry the coal from the surface mine, down the mountain, across State Route 10, across the Guyandotte River, and across the CSX Railroad to the load-out facility; (3) build a new haul road with a new bridge across the Guyandotte River and transport the coal by truck from the extraction facility to the unit train load-out facility.

Since there was no contiguous county road system in place between the surface mine and the load-out facility and most of the county roads in the area were narrow, steep and impassable by large coal trucks, Heartland finally decided on a new haul road and new bridge to move the coal from the extraction facility to the loading facility. The location of the unit train load-out facility required Heartland to build two miles of railroad track to connect the load-out facility to the existing CSX track. Altogether, five separate

construction projects were involved in building this coal mine. Four of the projects (1. Haul road; 2. Bridge; 3. Loading facility; 4. Side tracks) were built by independent contractors. The Mine Safety and Health Administration ("MSHA") acknowledges safety jurisdiction over all of the construction projects, except the bridge. App. A-5.

Heartland entered into a written agreement[16] dated January 25, 1991, with the West Virginia Department of

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[16] The agreement states, in part, as follows:

"THIS AGREEMENT, executed in quadruplicate, made and entered into this 25th day of January, 1991, by and between the West Virginia Department of Transportation, Division of Highways, hereinafter called "Department," and Heartland Resources, Inc., a corporation, hereinafter called "Heartland,"

WITNESSETH, that

WHEREAS, to facilitate its surface mining operations on Bryan Ridge, near the Lincoln County/Logan County Line, Heartland desires to construct a bridge over the Guyandotte River, approximately 5.9 miles of haul road and approximately 0.25 mile of access road to a new unit train load-out facility near Atenville in Lincoln County; and

WHEREAS, Heartland desires cooperation of Department in accomplishing the design and construction of the aforementioned Guyandotte River Bridge, haul road and access road, and further desires Department's permission to upgrade certain roads on the Department's State Road System as parts of the haul road and related facilities; and

Transportation. App. F-46-53. Hearland obtained the cooperation of the state department in accomplishing the design and construction of the bridge and haul road. In return Heartland agreed to convey the completed road and bridge to the Department at some unspecified time in the future, within the control of Heartland.

For purposes of this case the haul road and bridge were not conveyed by deed to the West Virginia Department of Highways. In addition, the 1992 state highway map for Lincoln County, West Virginia does not depict the new haul road or bridge as part of the State Highway System. App. A-15.

WHEREAS, Department considers it to be in the public interest to cooperate with Heartland in accomplishing this work since the completed road and bridge is to be conveyed to Department to become part of the State Road System;
NOW, THEREFORE, in consideration of the faithful performance of each party of the mutual agreements hereinafter set forth, Department and Heartland agree as follows:

* * *

It is understood and agreed that upon execution, delivery, and acceptance of the aforesaid deeds and fulfillment by Heartland of all of its obligations under this Agreement, Department shall take official action by Commissioner's Order to take those portions of the aforesaid haul road not now on the State Route System as part of its State Road System, including the Guyandotte River Bridge."

Bush & Burchett, Inc's., ("BBI") contract[17] with Heartland, executed on September 24, 1990, required it to design and construct the bridge for transportation of coal to the railroad load-out to be constructed near Harts, Lincoln County, West Virginia. App. G-55.

The surface mine, haul road and load-out facility were built on rugged, mountain terrain. When Bush &

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[17] The agreement states, in part, as follows:

"The work will consist of a contract to construct a bridge for transportation of coal to a railroad load-out to be constructed near Harts, Lincoln County, West Virginia.

The contract will consist of the complete design and construction of a vehicular bridge crossing West Virginia State Route 10, the Guyandotte River, and the CSX Railroad at a location near Harts, Lincoln County, West Virginia.

* * *

You must read and be familiar with the conditions of the proposed contract since its terms affect the work and costs of administrations for this contract. Note that you will be required to provide among other requirements, the following:

* * *

Establishment of a complete safety plan and program under the U.S. Coal Mine Health and Safety Act of 1969 and mandatory standards of MSHA (if required by law). Necessary instructions can be obtained upon request and will be sent to the successful bidder."

Burchett, Inc., first mobilized to the job site, there were no county roads or connecting roads in existence. Bush & Burchett, Inc., traveled the CSX Railroad right-of-way to access the work site. The coal haul road begins at the surface mine and ends at the unit train load-out facility. At times Heartland placed a gate across the haul road at the load-out facility. At the load-out facility, Heartland constructed a water diversion ditch to prevent water from running across the haul road. This ditch marks the end of the haul road.

The work site in question is the bridge. It was built on coal company property by the coal company's independent contractor as a coal haul road for transporting raw coal from extraction to loading. The coal haul road is not only "appurtenant" to the extraction facility, it is, in fact, an integral part of the coal mine itself. During construction of the bridge, OSHA performed two safety inspections and issued citations totaling $337,200.00.

STATEMENT OF THE CASE

C. THE DECISION OF THE OSHRC

The OSHRC declined to review the decision of the Administrative Law Judge ("ALJ") and thus the opinion of the ALJ became final.

The ALJ improperly distinguished BBI's case law authorities. The ALJ stated:

> "However, this case is distinguishable from the cases cited by Respondent in that in those cases, mine owners or independent contractors argued that MSHA did not have jurisdiction over their facilities in order to avoid penalties. In this case, an independent contractor argues that MSHA, rather than OSHA, has jurisdiction in order to avoid penalties impossed by OSHA." App. B-10

The ALJ employs an improper legal standard in determining jurisdiction. ALJ's standard is that jurisdiction is determined in any manner that will eliminate the avoidance of penalties.

The ALJ decided in favor of OSHA jurisdiction based on the authority of Old Dominion Power Co. v. Donovan.[18] App. B-10

In his brief to the Court of Appeals the secretary agreed that the ALJ erred in relying on Old Dominion

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[18] 772 F.2d 92 (4th Cir. 1985).

Power [19], supra ,for the proposition that BBI is not covered by the MSA. App.H-58.

Relying on the agreement between "Heartland" and the state road department, the ALJ held that, ... "the MSA specifically excludes the bridge from its application by virtue of the fact that it was not intended for solely private use, but was public." App. B-40.

The ALJ's ruling erred in its reliance on the purported public nature of the haul road and on the interpretation of the MSA. The ALJ's view that the bridge was "Public" under the MSA is contradicted by the ALJ's own findings of fact. The ALJ relied on the agreement between Heartland and the West Virginia Department of Transportation, but that agreement provided for conveyance of the area to the state upon completion of construction of the project.

The ALJ did not find that the property had already been conveyed to the state before the inspection; he found that... "the completed road and bridge was to be conveyed to the Department to become part of the State Route System". App.B-37.

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[19] ibid.

D. THE OPINION OF THE COURT OF APPEALS

The Court of Appeals affirmed the ALJ's ruling of OSHA jurisdiction. The Court of Appeals erroneous decision is a product of the following flawed reasoning:

> "... A two-step analysis is used to determine whether OSHA jurisdiction has been preempted: (1) whether a regulation has been promulgated by a state or federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue. Pennsylvania Elec. Co. v. FMSHRC, 969 F.2d 1501, 1504 (3rd. Cir. 1992).
>
> Because MSHA has promulgated regulations that are sufficiently broad to include the work site at issue, see 30 C.F.R. Ch. 1 (1996), OSHA would have been preempted if MSHA had jurisdiction over the work site."
>
> App. A-10.

The Court of Appeals makes the necessary finding that precludes OSHA jurisdiction, i.e. MSHA regulations cover the work site at issue. But the Court of Appeals injects an additional element into the analysis, not permitted

by the statute, [20] i.e., OSHA jurisdiction is not pre-empted unless MSHA has jurisdiction over the work site. The statute provides that nothing in the "Act" shall apply to working conditions of employees if other federal agencies exercise statutory authority to prescribe safety regulations that cover the work site at issue.[21]

Nonetheless, the Court of Appeals failed to rule that the OSHA "Act" does not apply to working conditions of employees who are building a coal haul road to be used by the "operator" for the sole purpose of transporting coal from extraction to loading. This ruling violates the OSHA "Act".[22]

The Court of Appeals focused on whether the work site was a "Mine" within the meaning of the "MSA". The Court of Appeals recognized that BBI was an "operator" as that term is defined in the MSA. The Court of Appeals further recognized that the MSA applies to each coal mine and to each "operator" of a mine. App. A-10. However the Court of Appeals erroneously concluded that BBI was not covered by the MSA.

The Court of Appeals ruled that at the time of the OSHA inspection the road and bridge were "dedicated" to the "public" by Heartland. App. A-15-16. Thus, OSHA had jurisdiction of the "public" road. There is no support for

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[20] 29 U.S.C. § 653(b)(1); section 4(b)(I) of the "Act"; App. C

[21] ibid.

[22] ibid.

this conclusion in the MSA. Even though the other circuits have held that the MSA must be construed liberally in order to give effect to the broad scope of the act, the Court of Appeals stated, "...Without some limitation on the meaning of 'roads appurtenant to' MSHA jurisdiction could conceivably extend to unfathomable lengths..."

Thus, the Court of Appeals limits the scope of the MSA. In order to limit the scope of the MSA, the Court of Appeals refused to define "appurtenant to", as used in the MSA. App. A-11, Fn. 6. Thus, the Court of Appeals did not rely on the provisions of the MSA in deciding that OSHA had jurisdiction of the work site at issue.

The Court of Appeals also committed additional legal error by ruling that the haul road had been "dedicated" to the public prior to the OSHA inspection. App. A-15-16. In finding a "dedication" the court relied on the agreement between Heartland and the state road department. But this agreement is clear that the "dedication" is to be by deed at some unspecified time in the future after construction of the project is complete. App. A-16. As the OSHA inspection took place during construction of the bridge, no "dedication" had occurred prior to the inspection.

In the final analysis the Court of Appeals held that the haul road with bridge was not a road appurtenant to an area of land from which minerals are extracted, and, therefore was not covered by the MSA.[23] App. A-9-16. The Court of Appeals further held that the haul road with bridge

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[23] 30 U.S.C. § 802(h)(1)(B); App. D.

was not...lands...structures...facilities...or other property...on the surface...used in, or to be used in...the work of extracting minerals...or used in, or to be used in the work of [24] storing, and loading of ...coal...and such other work of preparing such coal as is usually done by the operator of the coal mine.[25]

The Court of Appeals held that a coal mine operator who employs an independent contractor to build the bridge portion of a coal haul road which is an integral part of the coal mine proper and which is the only way the raw coal can be transported from extraction to loading for delivery to the ultimate consumer is an activity not covered by the MSA.

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[24] 30 U.S.C. § 802(h)(1)(C); App. D.

[25] 30 U.S.C. § 802(i); App. D.

ARGUMENT

A. THE CONFLICTS WITH OTHER CIRCUITS

The Court of Appeals for the third, fourth, ninth and DC circuits have all construed the MSA liberally so as to give effect to the broad scope of the act. See F.N. No 15. Here, the Court of Appeals interpreted the MSA narrowly and even ignored its provisions and ignored the plain meaning of various terms that are defined in the MSA.

In determining MSHA Safety Jurisdiction, the third and fourth circuits have adopted a functional analysis test. See F.N. No. 15. This test simply states that if the function of the work site involves an activity which is enumerated in section 802(h)(1)(A)(B) or (C) or in section 802 (i) of 29 U.S.C., then MSHA has safety jurisdiction of the worksite, if MSHA has promulgated a regulation governing the work site at issue. Under the functional analysis test, neither the inter agency agreement nor a third party agreement can detract from safety jurisdiction as plainly stated in the MSA.

The third and fourth circuits have also held that transportation of raw coal to the preparation facility is work usually done by a coal mine operator and thus is part of the "work of preparing coal", even though "transportation" is not listed in the definition of a mine under the MSA. See F.N. 15.

The Court of Appeals did not employ the functional analysis test and consequently did not broadly interpret the MSA. The Court of Appeals stated that the road with bridge was Heartland's,... "only means of getting the

minerals from the surface mine to the load-out facility...". App. A-12. Thus, the Court of Appeals recognizes that the function of the haul road is essential to the work of extracting the coal. But the Court of Appeals rules that this activity is not covered by the MSA.

In determining whether the bridge was to be used in the work of loading the coal, the Court of Appeals analogized the haul road with bridge to a conveyor belt and structure. The Court of Appeals stated that the bridge was analogous to land beneath a belt line and that the tractor-trailer truck was analogous to the belt line. So that the truck was subject to MSHA safety, but the land beneath the truck was not subject to MSHA safety. App. A-18. Consequently, the extraction facility, the haul road, the load-out facility, the side tracks and the coal trucks are all subject to MSHA safety, but the bridge is subject to OSHA safety.

However, in the Court of Appeals conflicting analysis of the MSA, the court neglected to mention that "land" is enumerated in section 802(h)(1)(C) of the MSA. So, even if the bridge is analogous to land, rather than to conveyor belt structure, it meets the functional analysis test.

The sole purpose of the bridge was to function in the work of transporting the raw coal for storing and loading. The Court of Appeals stated,... "Transporting of coal, which, unlike loading, is not delineated as one of the tasks associated with the work of preparing coal. See 30 U.S.C.§ 802(i)..." The Court of Appeals, unlike the third and fourth circuits, did not consider whether transporting of raw coal

from an extraction facility to a unit-train load-out facility was "work...usually done by the operator of the coal mine". See 30 U.S.C. § 802(i).

The Ninth Circuit has adopted a standard to the effect that "Mining means what the statute says it means". (Plain Meaning) See F.N. 15. Had the Court of Appeals employed this standard, the bridge would have been determined to be a "structure on the surface to be used in the work of mineral extraction and transporting raw coal for the sole purpose of storing and loading". Under this standard the bridge is defined as a coal mine under the MSA.

In giving a broad, sweeping definition to the word "Mine" the DC Circuit in Donovan v. Carolina Stalite Co., supra ,adopted the integrated plant standard. See F.N. 15. The court ruled that a processing facility (Carolina Stalite), which was near a mine although not a "mine in the classic sense," was nevertheless a "mine" under the MSA:

> Were we governed by ordinary English usage, we might well agree with the Commission. Carolina Stalite does not extract the slate it processes and, as the Commission said, its facility cannot be considered a "mine in the classic sense." However, neither does Carolina Stalite manufacture concrete masonry blocks, the primary end use for stalite, and it is by no means perverse to characterize the Stalite facility as a mine.

> The physical proximity and operational integration of Carolina Stalite and Young Stone, whose plant is unquestionably subject to the Act, permit those facilities to be viewed, in industrial and economic reality, as distinct from questions of legal title to the premises, as a unified mineral processing operation.

Id. at 1551 (emphasis added).

Applying the integrated plant standard to the instant case results in a determination that the surface mine, haul road, and unit train load-out facility are a unified coal extraction and processing operation because of their physical proximity and operational integration. The Court of Appeals failed to employ this standard.

ARGUMENT

B. REASONS FOR GRANTING THE WRIT

Congress has mandated the broadest possible interpretation of the MSA in determining what is a mine. Doubts should be resolved in favor of inclusion of a facility within the coverage of the MSA.

The question of what is a "coal mine" under the MSA decided by the Court of Appeals below has been the subject of numerous differing and conflicting interpretations by the Circuits in a variety of circumstances over a long period of time. Confusion has been generated by this conflict. The confusion regarding safety jurisdiction leads to decrease in work site safety. The Court of Appeals below recognized this:

> "... highway maintenance workers would be subject to MSHA regulations when maintaining roadways 'appurtenant to' extraction facilities, but subject to other safety regulations when working on roadways elsewhere, leading to 'duplicative jurisdiction' of workers, which could create confusion as to what safety regulations need to be followed at any particular time, especially since 'appurtenant to' is such a nebulous boundary. Such confusion, as was argued in Otis Elevator, could lead to a decrease in safety...". App. A-12-13.

The "duplicative jurisdiction" of workers is also a nationwide problem for independent contractors.

Independent contractors are normally subject to the OSHA regulations. The problem begins when they contract to work for government agencies or private employers who are themselves already subject to the safety jurisdiction of another Federal agency.

The problem is that the OSHA standards often conflict with other agency's standards pertaining to the same hazard. For example, the MSHA may have jurisdiction over certain excavations, and in some instances, its regulations directly conflict with those of OSHA which apply to excavations.

The Department of Treasury has jurisdiction over explosives, and its requirements are, in some cases, not the same as OSHA's. The Department of Agriculture and the Food and Drug Administration have standards applying to packing houses which conflict with OSHA's general regulations. In these cases, an employer is caught in the middle, in that he may be fined by OSHA for doing what he is required to do by another governmental agency.

BBI, itself, has built other coal haul road bridges for other coal mine "operators" and has been subject to MSHA safety enforcement. So when is the independent contractor subject to MSHA safety and when is it subject to OSHA safety? Confusion exists.

"The Act" should be enforced fairly and even-handily. Two employers with identical working conditions should not be treated differently. Nor should one employer

with two identical working conditions be subject to two different sets of safety regulations.

In this case, BBI, was one of several independent contractors engaged in building a large coal mine. BBI's construction contract calls for compliance with MSHA safety. All of the other independent contractors and employees involved in the project were subject to MSHA jurisdiction. BBI had every reason to believe that it was also subject to MSHA safety standards for this project. BBI did not even have the OSHA safety regulations at the work site because they were believed to be inapplicable. BBI was assessed with $337,200.00 in civil penalties. The largest part of the penalty was for willful citations. BBI's good faith belief that OSHA safety standards were not applicable to the work site prevents BBI from having the requisite "state of mine" to sustain a willful violation. Nonetheless, OSHA was unsympathetic. The OSHRC refused to review the case. The Court of Appeals below narrowly interpreted the MSA and BBI feels like a confused victim subjected to an exorbitant government fine for no good reason.

The conflict between OSHA jurisdiction or MSHA jurisdiction is a nationwide problem. The decision below is a radical departure from the decisions of the other circuits and is a violation of the intent of Congress; it demonstrates a need for the exercise of this Court's power of supervision.

CONCLUSION

Petitioner respectfully submits that it has met the Court's standards set forth in Supreme Court Rule 10.1 for granting certiorari. The petition should be granted.

Respectfully Submitted,

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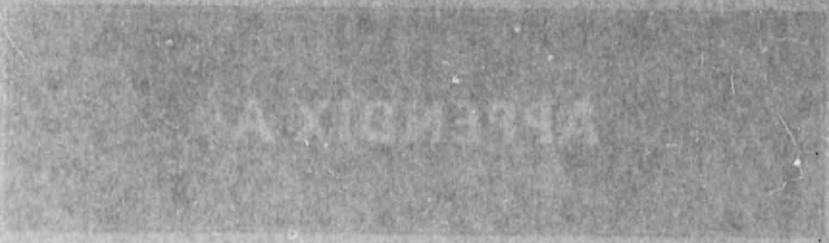
APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNPUBLISHED OPINION

Sixth Circuit Case No. 95-4331
Filed January 22, 1997



NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nº. 95-4331

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Bush & Burchett, Inc.,
Petitioner,

v.

Robert B. Reich, Secretary of Labor; The Occupational Safety & Health Review Commission,
Respondents.

On Appeal from the Occupational Safety and Health Review Commission

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Decided and Filed January 22, 1997

Before: KENNEDY, BOGGS, and WOODS*, Circuit Judges.

* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM. This case arises from the issuance of three citations by the Secretary of Labor against Bush & Burchett. Inc. ("BBI") for violations of the Occupational Safety and Health Act of 1970. The violations were issued during two separate inspections at a bridge construction site. BBI contested each citation and the two cases were consolidated. BBI argues on appeal that the Occupational Safety and Health Review Commission ("OSHRC") erred in upholding the citations because the Mine Safety and Health Act ("MSHA") 30 U.S.C. § 801 *et seq.*, had preempted the Occupational Safety and Health Administration's ("OSHA") jurisdiction. BBI also argues on appeal that OSHRC's decision upholding $337.900 in civil penalties was not supported by the administrative law judge's ("ALJ") findings of fact and conclusions of law or supported by the evidence. We affirm.

I.

Heartland Resources, Inc. contracted with BBI to build a bridge over the Guyandotte River in West Virginia. The construction project included the roadway approaches to the bridge. Heartland was building a large coal mine on 22,000 acres of land in Lincoln County, West Virginia and needed to build the bridge to connect the surface mine at the top of Bryan Ridge Mountain to the railroad loadout facility, located on the opposite side of the Guyandotte River.[1]

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[1]The distance between the two locations is approximately 6.5 miles. After the coal is removed from the mountain top by surface mining, it is hauled by tractor-trailer truck down the

Even though Heartland obtained seven surface disturbance permits for the extraction and loadout facilities, it did not file for a surface disturbance permit for the haul road and bridge. Instead, Heartland showed on its permit application that the transportation route from the extraction facility to the loadout facility would be a county road system although. at the time, there was no contiguous county road system in place between the surface mine and loadout facility.[2]

Heartland had made an agreement with the West Virginia Department of Transportation that Heartland would convey the bridge and haul road to the Department of Transportation after completion, to become part of the state road system. The "haul road" to be constructed under the agreement was to begin on Lincoln County Route 72, near Heartland's mining operation, and continue for approximately 2.4 miles to Route 72's junction with Delta Route 43. Petitioner agreed to improve Route 72 to that point. From this

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mountain and across Route 10, the Guyandotte River, and the CSX Railroad tracks to the loadout facility, where the coal is loaded into a unit train at the rate of seven thousand tons per hour and shipped to an electric utility.

[2]The haul road being constructed could not have been permitted as a coal haul road under federal law because a cemetery is located approximately 40 feet from the haul road. 30 U.S.C. § 1272(e)(5) prohibits the operation of surface coal mining, which includes coal haul roads that fall within the definition of a mine, within one hundred feet of a cemetery.

point, a new road was to be constructed for approximately 3.5 miles to Delta Route 38. Petitioner would improve Route 38 to its intersection with U.S. Route 10. The road would then continue over the newly constructed bridge to span Route 10, the Guyandotte River, and the mainline CSX Railroad and connect with Delta Route 25, which would be upgraded. Thus, the "haul road" plus the bridge would connect public roads, namely Route 72, Delta Route 43, and Delta Route 38. Under the agreement, Heartland, which owned the property,[3] was required to prepare right-of-way plans and convey all rights-of-way by proper deeds to the Department of Transportation. Although Heartland, under the agreement, is required to perform future maintenance on the haul road and bridge, the work will be subject to the Department of Transportation's approval and conditions. The West Virginia Highway Patrol polices the bridge and the road and bridge have been given a secondary route number, indicating that it is a county road, although, at the time of trial, the haul road and bridge had not been formally conveyed to the Department of Transportation.

Because the bridge was intended for public use as part of the state road system, the Department of Transportation assigned a project supervisor to verify materials for the bridge during its construction. And, under the contract

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[3]Heartland or one of its sister companies owned the land where the bridge was located, as well as portions of the haul road, including the loadout facility at the railroad.

between BBI and Heartland, BBI was required to conform with the Department of Transportation's specifications and requirements.

Under the agreement between BBI and Heartland, BBI was required to establish a safety plan and program. It was Heartland's responsibility, however, to secure all necessary permits required for the construction of the bridge. Even though Heartland had obtained surface disturbance permits and begun construction of the mine, haul road, and loadout facility in 1990, it did not obtain an MSHA identification number until August 1991 and BBI never obtained an MSHA identification number.

MSHA officials believed that they did not have safety jurisdiction over the bridge site because it was not on coal company property and was not a coal company facility. Heartland also believed that MSHA did not have jurisdiction over the road and bridge construction because "[they were] built for the state." On September 10, 1991, MSHA, however, had cited Heartland for failure to berm the haul road from the mine site down to the bridge, as required by MSHA regulations. Heartland abated the citation by installing berms. Later, sometime after 1992, Heartland removed the berms in response to a letter written by the Department of Transportation indicating that the raised berms had caused severe drainage and erosion problems.

The OSHA citations involved in this case were issued as the result of two separate inspections of the bridge site. The first inspection, which began on June 20, 1991, was prompted by the deaths of two BBI employees. The second inspection, which occurred on September 4, 1991, was in response to a complaint filed in the United Steel Workers Union, Local 14-614, which represented the employees at the site.

On June 19, 1991, two fatalities occurred at the bridge site. Two BBI employees, Greg Pridemore and Ralph Snyder died during an attempt to place one of the bridge's beams on the caps of two bridge piers. Under the plan formulated by the owner of BBI and the project manager, two cranes were to lift the concrete beam and place it on the pier caps. Pridemore and Snyder were stationed atop one of the piers. They were killed when the boom of one crane collapsed on top of the pier where they were standing.

Before the fatal lift, the cranes were positioned on solid timber mats, which had been prepared for them to travel on. They then moved up the river bank, traveling on the mats, suspending the beam a few feet above the water. When the cranes reached the pier caps, they stopped and simultaneously hoisted the beam above the pier caps. They had to stop, however, when the smaller crane came off the ground slightly. The cranes then swung their booms to move the beam closer to the pier caps, but the smaller crane continued to come off the ground. The beam was twice

temporarily placed on the middle of the piers while the smaller crane was repositioned to complete the transfer. The timber mats, however, did not extend far enough. Owner Joe Burchett, foreman Jack Cochran, and supervisor Fred Smith then discussed the possibility of extending the mats. They hoped that by moving the smaller crane closer to the pier caps, they could maintain a correct boom angle that would prevent tipping. They decided, however, simply to level and compact the ground in front of the smaller crane with a backhoe and allow the crane to sit directly on the ground during the lift. The plan, however, failed and the lift resulted in overloading both cranes when the smaller crane's boom collapsed against the cap of pier two. This resulted in the end of the beam that the smaller crane had been carrying falling into the river, causing the boom of the larger crane to collapse onto the cap of pier three, pinning Snyder and knocking Pridemore into the river.

OSHA compliance officer John A. Johnson began to inspect the site the next day, in accordance with OSHA policy to inspect a work site where a fatality had occurred. Before the inspection occurred, however, the area OSHA office contacted the area MSHA office, and both determined that MSHA did not have jurisdiction at the accident site because the site was not at a mine. Johnson visited the work site on several occasions. Following a closing conference, OSHA issued one serious citation, containing 25 separate items, and one willful citation, containing 10 items. The total proposed penalty for these violations equaled $243,500.

OSHA conducted a second inspection after receiving a complaint from Gerald Overby, the local union president. Overby reported to OSHA that employees at the work site were being lifted to their work stations underneath the bridge on the tip of a crane boom and that they were not being provided with any fall protection while they wrecked the forms underneath the bridge, even though the heights at which the employees were working ranged from 7 to 60 feet.

In response to this complaint, Johnson returned to the work site and conducted an inspection of the hazards related to the complaint. He interviewed several employees and personally observed two employees working at a height of 17 feet without any fall protection. Johnson held a closing conference for this second inspection, and issued two more citations. The total proposed penalty for these violations was $100,000.

II.

To the extent this case turns on factual determinations, we review OSHRC's decision to determine whether its findings are supported by substantial evidence. 29 U.S.C. § 660(a). Some confusion, however, exists as to what standard of review to use when determining MSHA jurisdiction. *See Otis Elevator Co. v. Secretary of Labor,* 921 F.2d 1285, 1288 (D.C. Cir. 1990).

Most courts that have construed the statutory definitions of 30 U.S.C. § 802 to determine whether MSHA

has jurisdiction over an entity or work site have not indicated what standard of review they used. But in reviewing these cases, it appears their level of scrutiny has been fairly rigorous. And one court has questioned whether the deference accorded to an agency's construction of a statute as discussed in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) applies in the context of an agency's determination of its own statutory jurisdiction. *Otis Elevator Co,* 921 F.2d at 1288. Additionally another court has specifically held that the standard of review is plenary. *United Energy Servs., Inc. v. FMSHA,* 35 F.3d 971, 974 (4th Cir. 1994). Because we believe that OSHA had jurisdiction of the work site even if we review OSHRC's decision *de novo,* we need not decide the specific standard of review to be applied.

III.

The OSH Act authorizes the Secretary of Labor to set mandatory occupational safety and health standards for businesses affecting interstate commerce. *See 29 U.S.C. §* 651 *et seq.* The Act, however, exempts from the statute's reach employees who are regulated by other federal agencies.[4] *29 U.S.C. §* 653(b)(1). A two-step analysis is

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[4]29 U.S.C. § 653(b)(1) provides that "[n]othing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupation safety or health."

used to determine whether OSHA jurisdiction has been preempted: (1) whether a regulation has been promulgated by a state or federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue. *Pennsylvania Elec. Co. v. FMSHRC,* 969 F.2d 1501, 1504 (3rd Cir. 1992).

Because MSHA has promulgated regulations that are sufficiently broad to include the work site at issue, *see* 30 C.F.R. Ch. I (1996), OSHA would have been preempted if MSHA had jurisdiction over the work site.

The dispute in this case focuses on whether the work site is a "mine."[5] MSHA's jurisdiction reaches all "coal or other mine[s] . . . and each operator of such mine." 30 U.S.C. § 803. MSHA was intended to provide a "sweeping definition" of the word "mine," encompassing much more than the usual meaning attributed to it. *Donovan v. Carolina Stalite Co.,* 734 F.2d 1547, 1551 (D.C. Cir. 1984). The Act defines "coal or other mine" as follows:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form are extracted with workers underground. (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes,

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[5]In this case, there is no dispute that BBI would be an "operator" under the statute because BBI was an "independent contractor performing . . . construction." 30 U.S.C. § 802(d).

> tunnels and workings, structures, facilities, equipment, machine, too's, or other property in-cluding impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from the work of extracting such minerals from their natural deposits in non-liquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h) (emphasis added).

BBI first argues that the bridge work site falls within the meaning of § 802O(1)(B) because the road being constructed was "appurtenant to"[6] an area of land from which minerals are extracted and that MSHA does not expressly exclude a road "just because it is public .... MSHA includes all roads appurtenant to an area of land from which minerals are extracted." Petitioner's Brief at 20.

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[6]Because this case can be decided without determining the exact meaning of "appurtenant to" we do not address this issue.

Although BBI's position is not wholly without merit, since the Act is to be given a very broad reading,[7] we cannot accept BBI's reading of § 802(h)(1)(B). Not only does the statute not compel such a reading, but also such a reading is contrary to common sense. Without some limitation on the meaning of "roads appurtenant to" MSHA jurisdiction could conceivably extend to unfathomable lengths since any road appurtenant to a mine that connects to the outside world would necessarily run into yet other roads, thus becoming one contiguous road. Because of the potential reach of MSHA Jurisdiction if the definition in § 809(h)(1)(B) is left unfettered, "private ways and roads" cannot simply mean "any road." Otherwise, there could conceivably be no limit to MSHA jurisdiction, a result Congress clearly did not intend.

Moreover, BBI's interpretation could lead to bizarre results. For example, if all roads appurtenant to areas of land where minerals arc extracted were subject to MSHA, potentially all highway maintenance workers would be subject to MSHA regulations when maintaining roadways "appurtenant to" extraction facilities, but subject to other safety regulations when working on roadways elsewhere, leading to "duplicative jurisdiction" of workers, which could create confusion as to what safety regulations need to be followed at any particular time, especially since "appurtenant to" is such a nebulous

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[7]*See* Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-64, 1977 U.S.C.C.A.N. 3401. 3414.

boundary. Such confusion, as was argued in *Otis Elevator,*[8] could lead to a decrease in safety. While this argument is not dispositive, as the court in *Otis Elevator* held that workers could be subject to duplicative jurisdiction, our case does not compel reading the statute so that all roads "appurtenant to" extraction facilities become subject to MSHA.[9] Moreover, unlike *Otis Elevator,* where miner safety was directly at issue, miner safety in situations such as the one in this case may not always be involved since not all public roadways appurtenant to mineral extraction facilities are used in mining work.

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[8]Otis advanced the argument that permitting the Secretary to regulate Otis's employees under the Mine Act would create confusion and as a result decrease safety because the employees would be subject to MSHA at certain times and OSHA at other times. The Secretary countered by arguing that greater confusion would be created by having Otis regulated by OSHA when working in the mine while all other employees at the mine would be subject to MSHA. The court did not evaluate the merits of either claim since it felt that the plain meaning of the statute clearly encompassed Otis's employees working at the mine site: "For present purposes, . . . we may simply observe the Secretary's account 'is at least not so unthinkable,' and Otis's account is at least not so self-evident, 'as to compel the conclusion that the [statute] does not mean what it most naturally seems to say." Otis *Elevator. 921* F.2d at 1291.

[9]The court in *Otis Elevator* held that the statute compelled a finding that Otis was subject to MSHA jurisdiction because § 802(d) clearly defines "operator" to include "any independent contractor performing services . . . at such mine." 921 F.2d at 1290-91.

Alternatively, BBI argues that the haul road and bridge were and continued to be private up until the time of trial and thus the bridge work site fell squarely within § 802(h)(1)(B). It argues that, during its involvement with Heartland, the land on which the bridge was built was owned by Heartland or one of its sister companies and thus was not a public road. Any agreement between Heartland and the Department of Transportation, it contends, did not convey title but simply provided an opportunity for the road to become public in the future, and the status of the road in the future was irrelevant to the determination of whether MSHA had jurisdiction of the bridge construction site when the citations were issued. We disagree. The record supports OSHRC's finding that in this case, the bridge and roadway approaches should be considered "public."[10]

First, the contract between Heartland and the Department of Transportation provided that, upon completion, the roadway was to be conveyed to the State to become part of the state highway system and from its conception was intended for public use. Second, Heartland never prevented the public from using the bridge after the bridge had been constructed. Third, the state police regulate traffic on the bridge and it has been given a county secondary number, indicating its status as a public road. Fourth, a Department of Transportation employee had been assigned to oversee the

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[10]Because this is essentially a determination of fact we review OSHRC's finding to see if it is supported by substantial evidence.

construction of the bridge and Heartland had removed the berms at the request of the Department of Transportation because the bridge and haul road were to become a part of the county road system after their completion.

OSHRC's finding is also supported by the ordinary meaning of a public road because the definition of a public road includes an arrangement called a "dedication."[11] A dedication is the "appropriation of land.... by the owner for the use of the public, and accepted for such use by or on behalf of the public." Black's Law Dictionary 412 (6th ed. 1990). A party intending to dedicate land for public use may do so by "an explicit oral or written declaration of the owner . . . of his purpose to devote the land to the public use." *Ibid.* While we recognize that the bridge had not been deeded to the state at the time of the accident, we do not believe that this dispositive. The definition of a dedication includes dedications for future use by the public: "A dedication of land is generally defined as its devotion to a public use by an unequivocal act of the owner . . . manifesting an intention

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[11]A "public road" is defined as "[a] highway: a road or way established and adopted (or accepted as a dedication) by the proper authorities for the use of the general public, and over which every person has a right to pass and to use it for all purposes of travel or transportation to which it is adapted and devoted. The proper test in determining whether [a] road is a 'public' or 'private road' is use to which such roadway is put, and [the] fact that [the] road has been constructed at public expense is not conclusive." Black's Law Dictionary 1329 (6th ed. 1990).

that it shall be . . . used presently *or in the future." Seltenreich v. Fairbanks,* 103 F. Supp. 319, 323 (D. Alaska 1952), *aff'd,* 211 F.2d 83 (9th Cir.), *cert. denied,* 348 U.S. 887 (1954) (emphasis added). The key to a dedication is the intent of the dedicator and can be "shown by the owner's acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended." *Ibid.* It is clear from the record that Heartland intended to dedicate the bridge and haul road to the state. First, Heartland had made an agreement with the West Virginia Department of Transportation to convey the bridge and haul road to the state upon their completion. Second, Heartland manifested its intent by including in the agreement with BBI that BBI conform with the Department of Transportation's specifications and requirements.

IV.

Next, BBI argues that even if the bridge did not constitute a private way or road under the act, it was a "structure . . . or other property . . . to be used in . . . the work of extracting minerals or . . . storing and loading of . . . coal . . . " Petitioner's Brief at 27 (citing, 30 U.S.C. § 802(h)(1) and § 802(i)).[12] BBI's argument is that the surface mine and loadout facility, which are both clearly subject to MSHA

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[12]"[W]ork of preparing the coal" is defined at § 802(i) as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

jurisdiction, cannot be separated from the haul road, and thus, must be regulated by MSHA: "[T]he physical proximity and operational integration of the haul road and the surface mine and loadout . . . permit all three facilities to be viewed as a unified, integrated coal mining operation, regard-less of legal title to the premises." Petitioner's Brief at 27. BBI analogizes the haul road and bridge to a beltline system that moves coal within a mine because, like a beltline system, the haul road and bridge are the only way to move the coal from the surface mine to the loadout facility.[13] BBI argues that miners who transport the coal from the surface mine to the loadout facility using the haul road and bridge will be

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[13]BBI notes that one court has indicated that conveyor belt systems used to transport coal, even when not entirely on mine property can be regulated by MSHA. *See United Energy Servs.*, 35 F.3d at 971. In *United Energy Services,* an electric power company, located next to a coal mine used coal waste, "gob" to generate electricity. The electric company was responsible for maintaining and operating the conveyor belt system, which rested primarily on its own property, although a small portion of the system extended 300 to 500 feet into mine property. The mine employees used bulldozers to load the gob onto the conveyor belt, which then carried the gob into the power plant to be burned. MSHA cited the electric company for failing to comply with MSHA safety standards and the electric company challenged the citations, claiming that, because it was not an "operator," MSHA did not have jurisdiction over it. The Fourth Circuit disagreed, holding that not only was United Energy an operator within the meaning of the statute, but also that the "dozer trap, conveyor belt, and other equipment . . . qualify as 'structures, . . ., equipment, [and] machines' used in the . . .' work of preparing coal." *Id. at 975.*

involved in the "work of preparing coal." Further, BBI argues that the fact that the mine was not yet operational is irrelevant since § 802(h)(1)(C) covers structures or property "to be used in" the work of preparing coal. We disagree.

Although BBI's argument is not meritless, as it is undisputed that the road and bridge will be used as Heartland's only means of getting the minerals from the surface mine to the loadout facility, BBI's analogy is not completely appropriate. The conveyor belt system can be better analogized to the tractor-trailer trucks that will be used in hauling the coal to the loadout facility. And regardless of whether the haul road and bridge are subject to MSHA jurisdiction, the tractor-trailer trucks and employees who run them will be protected by MSHA. The road and bridge can be analogized to the land underneath the conveyor belt system. We believe this analogy is better because it serves the purpose of protecting mine workers, while not subjecting all roads used for transporting coal, regardless of ownership, to MSHA jurisdiction. Moreover, unlike a conveyor, which is directly used in the "loading" of coal, a road and bridge are used in the transporting of coal, which, unlike loading, is not delineated as one of the tasks associated with the work of preparing coal. *See 30* U.S.C. § 802(i). Additionally, it is not clear from the statute or legislative history that Congress intended to include roads within the meaning of 30 U.S.C. § 802(h)(1)(C), since Congress specifically dealt with roads in § 802(h)(1)(B).

V.

BBI also attacks the merits of the OSHA citations. First, BBI argues that the ALJ improperly relied on the Secretary's proposed penalties, failed to make an independent assessment of the penalty factors, and did not consider all of the relevant factors under 29 U.S.C. § 666(j). Second, it argues that the ALJ overlooked and misconstrued the relevant evidence pertaining to the citations. Both arguments lack merit.

The Commission has held that an ALJ may not routinely affirm the proposed penalty of the Secretary, but must make an independent determination based on factors enumerated in 29 U.S.C. 666(j).[14] The assessment of penalties under this section, however, is within the sound discretion of the Commission. *D & S Grading Co. v. Secretary of Labor,* 899 F.2d 1145, 1148 (11th Cir. 1990). In this case, the ALJ found that the Secretary had considered and properly applied the appropriate factors. He noted that the Secretary had credited the company with a 40% reduction based on its size, and appropriately refused to give further reductions under the other factors because the company "had no safety or health programs in place" at the work site and

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[14]29 U.S.C. § 666(j) provides that "[t]he Commission shall have authority to assess all penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

because "the willful items contained in both citations preclude such reductions." We find no abuse of discretion. It was within the ALJ's discretion to refuse to give reductions for good faith or prior history based on what he found the evidence in this case established. Moreover, the four factors set out in § 666(j) need not be given equal weight. And the gravity of a particular violation may warrant the assessment of the maximum penalty, even though the employer may rate perfect marks on the other three criteria. *See Secretary of Labor v. Nacirema Operating Co.*, 1 O.S.H. Cas. (BNA) 1001, 1003 (OSHRC 1972).

BBI's second argument is equally baseless. The ALJ's 94-page decision on the merits of the citations fully describes the facts leading up to the accident and surrounding the first and second investigations that led to the citations. He also dealt with BBI's affirmative and general defenses and explained his findings with respect to each of the contested citations.

VI.

For the foregoing reasons, OSHRC's findings that OSHA had jurisdiction and that the penalties assessed by the Secretary were appropriate and are **AFFIRMED**.

APPENDIX B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

DECISION AND ORDER

entered July 13, 1994

United States of America
OCCUPATIONAL SAFETY
and HEALTH REVIEW COMMISSION

One Lafayette Centre
1120 20th Street, N.W. -- 9th Floor
Washington, DC 20036-3419

Sectary of Labor	)	
Complainant,	)	
	)	Docket No. 92-0408
v.	)	92-1169
	)	
Bush & Burchett	)	
Construction Co., Inc.,	)	
Respondent.	)	

Appearances: Joseph T. Crawford, Esquire
Office of the Solicitor
United States Department of Labor
Philadelphia, Pennsylvania
For Complainant

Albert A. Burchett, Esquire
Bush & Burchett, Inc.
Allen,Kentucky
For Respondent

BEFORE: Administrative Law Judge John H. Frye, III

DECISION and ORDER
(JURISDICTIONAL ISSUE)

I. INTRODUCTION

This case involves an action by the Secretary of Labor against Bush & Burchett, Inc., a general contractor specializing in badge construction, pursuant to section 10(c) of the Occupational Safety and Health Act of 1970[1] (the "Act"). The Secretary alleges that Respondent failed to comply with certain safety standards at its work site in Harts, West Virginia.

Respondent performed certain construction work at this work site in pursuant to a contract with Heartland Resources, Inc., for the construction of a bridge for the transportation of coal to a railroad loadout facility.[2] Also included in the work is the construction of roadway approaches to the bridge. The bridge crosses over the Guyandotte River and connects two public highways -- State Route 10 and Delta Route 25.[3] While Heartland had the bridge constructed in order to provide access to its coal loadout facility, pursuant to an agreement between Heartland Resources and the West Virginia Department of Transportation, Division of Highways, on completion, the road and bridge were to be conveyed to the Department to

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[1] Need to get the "Act"

[2] G. Ex.8.

[3] *See* R. Ex.5; Tr. 189 (Elliott). Delta Route 25 appears to be an unimproved dirt road.

become part of the State Road System.[4] The West Virginia Highway Patrol polices traffic on the bridge.[5]

On June 19, 1991, a fatal accident occurred at the work site in which two cranes collapsed, resulting in the death of two of Respondent's employees. OSHA began an investigation that evening. Ms. Barazi, Industrial Hygiene Supervisor of OSHA, assigned Compliance Officer Richard Jeffrey to go down to the accident scene at about 4:45 pm.[6] Ms. Barazi also called Mr. Good, Assistant Area Director of OSHA, to inform him of the accident and that she had assigned Mr. Jeffrey to visit the scene.[7] During the visit, Mr. Jeffrey met Mr. Overby, a Union Representative and a foreman for Respondent Bush and Burchett.[8] However, Mr. Jeffrey did not conduct a full investigation of the case because it was getting dark and muddy, and most of the witnesses were gone.[9] On the following day, Mr. Jeffrey reported the results of his visit to his Supervisor and Area Director.[10]

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[4]G. Ex.7.

[5]Tr. 252 (Howell).

[6]Tr.27 (Good)

[7]*Id.*

[8]Tr. 12-14 (Jeffrey).

[9]Tr. 14 (Jeffrey).

[10]*Id.*

At about 9:50 am on June 20, the day after the accident, Albert Burchett, acting for Respondent Bush and Burchett, called Mr. Good to report the accident.[11] Mr. Good assigned Mr. Johnson that morning to conduct an inspection at the accident site because Mr. Jeffrey was scheduled to be on another inspection of some significance.[12] Prior to Johnson's departure for the job site, Mr. Good called Mr. Farmer, Sub-District Manager of MSHA, to inquire if MSHA has jurisdiction over the accident.[13] During the conversation, Mr. Farmer told Mr. Good that MSHA did not have jurisdiction at the accident site in Harts because MSHA did not have a mine there.[14] After the conversation, Mr. Farmer and Mr. Pauley[15] drove by the accident scene in order to satisfy themselves that there was no reason for MSHA to exercise jurisdiction over the accident.[16] Both concluded that MSHA did not

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[11]Tr. 31-32, 36 (Good).

[12]Tr. 27-28 (Good); Tr. 164 (Good).

[13]Tr. 60 (Farmer); Tr. 36-39 (Good).

[14]Tr. 39, 60-61 (Good).

[15]Mr. Herbert Pauley was the Coal Mine Inspection Supervisor of MSHA in the Madison, West Virginia, field office at the time of the accident. Tr. 141 (Pauley).

[16]Tr. 51 (Farmer); Tr. 142 (Pauley). Mr. Farmer and Mr. Pauley drove by the accident scene without getting out of the car or talking to anyone there. Tr. 63 (Farmer); Tr. 142-43 (Pauley).

have jurisdiction because the accident was not on active mine property.[17]

As a result of the OSHA inspection conducted by Mr. Johnson on June 20, the Secretary issued one serious and one willful citation to the Respondent on December 17, 1991. Respondent's notice of contest of these citations was docketed on February 7, 1992, with the Occupational Safety and Health Review Commission.

OSHA conducted another inspection of Respondent's work site on September 6, 1991, and issued one serious and one willful citation to Respondent on March 2, 1992. Respondent's notice of contest of these citations was docketed with the Commission on April 22, 1992. Following the filing of complaints and answers, these two cases were consolidated on July 20, 1992. Respondent filed a motion for summary judgment seeking a ruling that the Mine Safety and Health Administration (MSHA) had, pursuant to § 4(b)(1) of the Occupational Safety and Health Act, preempted OSHA's jurisdiction over the construction activity. That section provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other

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[17]Tr. 54 (Farmer) Tr. 144 (Pauley).

> Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

I denied this motion on December 22, 1992. Following an April 22, 1993, ruling from the Commission which, among other things, directed that Respondent be permitted to continue to pursue this argument at trial, I held a prehearing conference on May 6, 1993. At that conference, the parties agreed to: 1. bifurcate trial of the preemption issues and the issues related to the merits of the citations; 2. a schedule for the completion of discovery on both the preemption issue as well as on the merits prior to the trial of the preemption issue; 3. the appointment of a settlement judge to seek to resolve the party's differences; and 4. a trial date for the jurisdictional issues in October, 1993.

Despite several extensions of his jurisdiction and his best efforts, the settlement judge's efforts ultimately proved unsuccessful. The extended nature of the settlement efforts dictated that the October trial date be moved to January. A major snow storm forced a second postponement of the trial, which finally took place on March 15 and 16, 1994, in Charleston, West Virginia.

The factual situation which the trial revealed and in which OSHA exercised jurisdiction does not differ from

that presented on the motion for summary judgment. There is no reason to alter the result which was reached on that motion in 1992. I conclude that OSHA's jurisdiction over this construction activity was not preempted by MSHA and set these two cases down for a trial on the merits at the first available trial date, the week of November 28, 1994.

II. THE PARTY'S POSITION

Respondent maintains that its work site was subject to MSHA regulations at the time of the accident, and therefore OSHA's jurisdiction was preempted. In support of its position, Respondent makes the following arguments.

1. Respondent's activities fall within the literal definitions of the Mine Safety Act ("MSA"), and those definitions must be liberally construed in the broadest possible manner.[18] Respondent argues from the plain meaning of various terms that are defined in the MSA that

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[18]Respondent cites *Cyprus Industrial Minerals Co. v. Federal Mine Safety & Health Review Commission,* 664 F.2d 1116,1117 (9th Cir.1981); *Westmoreland Coal Co. v. Federal Mine Safety & Health Review Commission,* 606 F.2d 417,420 (4th Cir.1979); *Morris v. Mathews,* 557 F.2d 563,570 (6th Cir.1977); *Paluso v. Mathews,* 573 F.2d 4,10 (10th Cir. 1978); *St. Mary's Sewer Pipe Co. v. Director of United States Bureau of Mines,* 262 F.2d 378, 381 (3d Cir. 1959); *Marshall v Kilgore,* 478 F. Supp. 4, 7 (ED. Tenn,. 1979).

it was an independent contractor performing construction at a coal mine at the time of the accident.[19] Thus, it is Respondent's contention that the plain meaning of MSA compels the conclusion that its activity was within the scope of the MSA, which preempts regulation by OSHA.

2. MSHA regulations have been adopted that cover the same activities that were the subject of OSHA's citations. The fact that MSHA regulations covering respondent's activity had been adopted is itself sufficient to preempt OSHA regulations, as actual enforcement history is irrelevant to preemption analysis. In support of this argument, Respondent points out that case law holds that where MSHA has issued regulations covering certain activities at a mine site, OSHA has no jurisdiction over these activities. Furthermore, Respondent also states that MSHA regulations need not be identical to OSHA's regulations to have a preemptive effect.[20]

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[19]"Operator" is defined as "any independent contractor performing services or construction at such mine." 30 U.S.CA. sec. 802(d). "Coal . . . mine" is defined to include "private ways and roads appurtenant to" "an area of land from which minerals are extracted." 30 U.S.C sec 802(h)(1).

[20]Respondent cites *Columbia Gas of Pennsylvania, Inc. v. Marshall,* 636 F.2d 913 (3d Cir. 1980).

3. Case law holds that a "mine" exists before mineral extraction occurs.[21] Respondent points to the definition of "coal or other mines" in the MSA to include "lands . . . and . . structures, facilities . . . or other property . . . used in, or to be used in . . . the work of extracting minerals.[22] From the above definition, Respondent then argues that MSA applies to the work of independent contractors on structures to be used at some future time when extraction begins.

4. The road and bridge were private property at the time of the accident, thus falling within the MSA definitions which refer to "structures" and "private ways and road appurtenant" to a mine. In support of this position, Respondent refers to the agreement between Heartland Resources and the West Virginia Department of Transportation, which provided for conveyance of the bridge and roadway approaches to the State upon completion of construction of the project.[23] Respondent argues that the bridge and road were clearly privately owned at the time of the accident.

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[21] *Cyprus Industrial Minerals Co. v. Federal Mine Safety & Health Review Commission*, 664 F.2d 1116 (9th Cir.1981); *Bituminous Coal Operators' Association, Inc. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977).

[22] 30 U.S.C.A. sec. 802(h)(1).

[23] *See* G. Ex" 7.

In response to Respondent's arguments, the Secretary maintains that the bridge construction was not a project related to coal mining activity in a manner which would deprive OSHA of its jurisdiction over the safety and health of employees working on the project. The Secretary maintains that in order to be exempted under section 4(b)(1), a respondent must show not only that another agency has statutory authority over the activity in question, but that it has exercised that authority.[24]

In support of its position, the Secretary relies on the evidence from both its witnesses and the those of the Respondent. First, Mr. Farmer, Sub-District manager of MSHA, testified that there was no coal mine on the accident site and there was no coal mining jurisdiction.[25] Furthermore, Farmer testified that Respondent was neither on the list of contractors who registered with MSHA to work for coal mines, nor was there a pending application to open a new mine on the site.[26] From Farmer's testimony and the testimony of both Mr. Jeffrey (OSHA's initial

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[24]The Secretary cites *Northwest Airlines, Inc.*, 8 BNA OSHC 1982 (1980), and *Secretary of Labor v. Burlington Northern Railroad Company*, 13 BNA OSHC 2099 (1939).

[25]Tr. 53.

[26]Tr. 54.

inspector at the accident site)[27] and Mr. Good (Assistant Area Director for the Charleston OSHA office)[28], the Secretary points out that MSHA was aware of the accident, had enough time to review the circumstances, and concluded that it had no jurisdiction over the issue.

Second, the Secretary maintains that the testimony of Respondent's witnesses did not alter the conclusion that OSHA properly had jurisdiction over the subject matter. Mr. Burchett, President of Respondent, testified that he did not obtain a MSHA contractor number although required by the contract with Heartland.[29] In addition, Respondent's engineer, Mr. Ward, testified that no safety program under the MSHA Act was submitted although required under the

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[27]Jeffrey testified that on an initial visit to the accident site, he was told by an unnamed person that the job was being done by a coal company and that they were paying for the bridge to be built. (Tr. 15). He also testified that based on the type of project that the Respondent is engaged in, he believed that OSHA properly had jurisdiction. (Tr. 21).

[28]Good testified that based on his discussion with Mr. Farmer, Sub-District Manager from the local MSHA office on the jurisdiction issue, he was satisfied that OSHA properly had jurisdiction of the accident. (Tr. 28).

[29]Tr. 196.

contract.[30] Most importantly, the Secretary argues that Mr. Dula, general manager of Heartland Resources at the time of the accident, testified that Heartland Resources is a landholding company and not a coal mining subsidiary of Heartland Coal, Co.[31] From this testimony, the Secretary argues that contractor of the project was a landholding company that never believed that it was constructing a bridge or road that would be under MSHA jurisdiction. Thus, from the testimonies of the various witnesses, the Secretary concludes that OSHA, rather than MSHA, has jurisdiction over the subject matter.

III. OPINION

Respondent's argument is erroneous on several grounds.

1. The present case is distinct from the cases that the Respondent cites. Respondent is correct that case law dealing with the scope of MSHA's jurisdiction has tended to view that jurisdiction expansively. It has been held that MSHA has jurisdiction over a certain facility when it engages in the extraction, milling and preparation of

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[30]Tr. 286-87.

[31]Tr. 312-13.

minerals,[32] and that a mine includes facilities and equipment "used in" the work of preparing coal,[33] or "to be used in" the work of extracting and processing coal.[34]

However, this case is distinguishable from the cases cited by Respondent in that in those cases, mine owners or independent contractors argued that MSHA did not have jurisdiction over their facilities in order to avoid penalties. In this case, an independent contractor argues that MSHA, rather than OSHA, has jurisdiction in order to avoid penalties imposed by OSHA.

In this case, Respondent's relationship to the mine activity regulated by MSHA is more analogous to that of

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[32] *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984) (slate gravel processing facility constitutes a "mine" within the meaning of MSHA); *Cyprus Indus. Minerals Co. v. Federal Mine Safety & Health Comm'n*, 664 F.2d 1116 (9th Cir. 1981) (accident site at which contractor dug tunnels in search of commercially exploitable deposits of talc, was a "mine" within the meaning of MSHA).

[33] *Harman Mining Corp.* v. *Federal Mine Safety & Health Comm'n, 671* F.2d 794 (4th Cir. 1981) (car dropping, a method of loading already extracted and prepared coal into railroad cars for transportation, is a "mine" within the meaning of MSHA).

[34] *Bitminous Coal Operators' Ass 'n v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977).

the electric utility in Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985). Old Dominion, an electrical utility serving southwestern Virginia, was an independent contractor of Westmoreland Coal Company.[35] The sole revenue derived by Old Dominion from its relationship with Westmoreland was from the sale of electric power. Old Dominion was cited by MSHA for violation of 30 C.F.R. § 77.704, a mandatory safety standard promulgated under the Mine Act, when one of its employees was electrocuted at an electrical substation near the coal mine. Old Dominion petitioned for review the decision of the Federal Mine Safety and Health Review Commission, which held that the utility was an independent contractor and operator within the meaning of the Federal Coal Mine Safety and Health Act, and that the utility had breached certain MSHA regulations. The Court of Appeals held that Old Dominion was properly regulated by OSHA and not by MSHA. The Court reached its conclusion by relying on the legislative history of § 3(d) of the Mine Act,[36] which makes clear that Congress intended to include within the Mine Act's definition of "operator" only those independent contractors who are engaged in mine construction or extraction, and

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[35]Westmoreland leased the facility where the fatality occurred and had contracted with Elro Coal Corporation to operate a mine on the property.

[36]30 U.S.C sec. 802(d).

who have a "continuing presence" at the mine.[37] The Court pointed out that since Old Dominion's only contact with the mine was the "inspection, maintenance and monthly reading of a meter for the purpose of sending a bill to the mine company for the sale of electricity,[38] the utility did not meet the definition of "operator" under MSHA, and therefore, it was not subject to MSHA regulations.

Several facts of the present case are similar to Old Dominion. First, Respondent, like Old Dominion, is an independent contractor constructing the bridge for Heartland Resources. Second, Respondent does not have a "continuing presence" at the mine because, after completion of the bridge project, it was no longer present at the facility.[39] Finally, like Old Dominion, which provides electricity not solely to the mine but also to southwestern Virginia, the bridge constructed by Respondent is not for the exclusive use of the mine. It is also part of the public highway system and it is used by people living on different

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[37]772 F.2d at 96.

[38]*Id.*

[39]In this aspect, the case for MSHA jurisdiction is even weaker here than in *Old Dominion* because in *Old Dominion,* the independent contractor has to inspect, maintain and read the meter at the substation monthly.

sides of the bridge.[40] The state police regulate traffic on the bridge.[41]

2. In order to have a preemptive effect over OSHA, the other agency must not only have statutory authority over the activity in question, but also it must exercise that authority.[42] As pointed out above, it is doubtful at best that MSHA had authority to regulate Respondent's work practices. In any event, after investigation MSHA concluded that it lacked that authority.[43] Consequently,

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[40]*See* Tr. 75 (Farmer); Tr. 231 (Cook).

[41]*See* Tr. 252-55 (Howell).

[42]*See Secretary of Labor v. Burlington Northern Railroad,* 13 BNA OSHC 2099, 2100 (1989) ("FRA has statutory authority to regulate the safety of railroad employees. However, that fact alone does not establish that the FRA has preempted the Secretary under 29 U.S.O sec. 653(b)(1)") (quoting *Consolidated Rail Corp.,* 10 BNA 1577, 1579 (1982)).

[43]Two MSHA officers went to the accident scene to determine if the accident had occurred on mine property and whether MSHA had jurisdiction. After their investigation, they determined that MSHA did not have jurisdiction over the accident. Tr. 50-54 (Farmer); Tr. 142-44 (Pauley).

it did not exercise any regulatory jurisdiction over Respondent's activities.[44]

3. The bridge was never meant to be private. From the agreement between Heartland Resources ("Heartland") and the West Virginia Department of Transportation Division of Highways ("WVaDOT"), the completed road and bridge was to be conveyed to the Department to become part of the State Road System.[45] The non-private nature of the bridge is illustrated by the testimony of both the Secretary's witnesses and those of the Respondent. Mr. Gartin, Coal Mine Safety and Health Inspector of MSHA, testified that in August 1991, he began an inspection of Heartland's mine in West Virginia. On September 10, 1991, he issued a citation for the lack of berms on the coal haul road leading to the bridge.[46] Heartland actually

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[44]In a somewhat related point, Respondent argues that the fact that mineral extraction had not yet begun at the time of the accident would not defeat MSHA's jurisdiction. See footnotes 21 and 22 and accompanying text. While Respondent may well be correct that MSHA has jurisdiction over mine construction before mining actually begins, here there is no indication that MSHA jurisdiction over the mine in question had been triggered at the time of the accident.

[45]*See* G. Ex.7.

[46]The citation says "Berms were not provided out on the outer banks of the elevated haulage roadway." Tr. 66 (Farmer). Tr. 90 (Gartin).

installed the berms in late 1991 or early 1992.[47] However, Heartland later removed the berms in response to a letter written by WVaDOT to Mr. Dula of Heartland indicating that the raised berms had caused severe drainage and erosion problems.[48] This indicates that WVaDOT believed that it, rather than MSHA, had jurisdiction over the coal haul road. Furthermore, Mr. Gartin testified that his supervisors, Mr. Pauley and Mr. Farmer, instructed him that MSHA did not have jurisdiction over the haul road because of the contract between Heartland and WVaDOT.[49] Mr. Farmer testified that to this date, he would not instruct his inspectors to conduct investigations on the bridge where the accident occurred because he believed it to be part of a public road and not subject to MSHA jurisdiction.[50]

The testimony of Mr. Dula, Mr. Cook and Trooper Howell also demonstrate that the road and bridge are not private. Mr. Dula, general manager of Heartland at the time of the accident, testified that he did not require the submission of a safety and health plan from the Respondent

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[47]Tr. 96(Gartin)

[48]*See* G. Ex 6; Tr. 72 (Farmer); Tr. 91-94 (Gartin).

[49]Tr. 109, 110 (Gartin); Tr. 74 (Farmer).

[50]Tr. 74.

as required under the contract[51] because internally Heartland did not think that MSHA had jurisdiction over the road and the bridge.[52] Mr. Dula also testified that the bridge was not owned by Heartland. In fact, the whole concept of the project was for Heartland never to take ownership because the road and bridge were to become part of the state system.[53] Moreover, Heartland never in any way prevented the bridge from being used by public vehicular traffic. Indeed, it does not have any legal ability to do so because it was built for the State.[54] Mr. Cook, Project Supervisor for WVaDOT, testified that the reason he was assigned to verify materials for the bridge project is because the bridge was intended to become part of the state highway system when completed.[55] He also testified that the bridge is not gated or barred in any way to prevent public use. In fact, it was intended for public use.[56] Finally, Trooper Howell testified that West Virginia State

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[51]*See* G. Ex 8 ("Establishment of a complete safety plan and program under the U.S. Coal Mine Health and Safety Act of 1969 and mandatory standards of MSHA [if required by law]).

[52]Tr. 312-13.

[53]Tr. 314-15.

[54]*Id.*

[55]Tr. 239.

[56]Tr. 240.

Police's jurisdiction include traffic violations that might occur on the bridge because it is a county road with county secondary route number.[57] Thus, the testimony of the various witnesses showed that the bridge was never and was never meant to be part of a private way or road appurtenant to a mine as that term is used in the Mine Safety and Health Act, 30 U.S.C. § 801(h)(1).

The fact that the bridge may have been in private hands during its construction does not change this conclusion. Clearly the MSA was not intended to apply to any activity engaged in by a mining company, [58] regardless of that activity's relationship to the business of mining. Here the MSA specifically excludes the bridge from its application by virtue of the fact that it was not intended for solely private use, but was public.

III. CONCLUSIONS OF LAW

A. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

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[57]Tr. 252

[58]Even if the MSA were so construed, the "owner" of the bridge in this case was a land development company which was affiliated with a mining company, not a mining company. See footnote 31 and accompanying text.

B. The Occupational Safety & Health Administration's jurisdiction over Respondent's activities at its work site located on W.Va. Route 10 one mile north of Harts, W.Va., was not preempted by the Mine Safety & Health Administration.

IV. ORDER

Trial of the merits of the allegations raised in the Secretary's complaints in these cases will take place beginning at 9:30 AM, Monday, November 28, 1994, and continue through the remainder of that week, if necessary, at a location to be designated in the vicinity of Charleston, W.Va.

/s/JOHN FRYE, III
JUDGE OSHRC

Dated: JUL 13 1994
Washington, D.C.

APPENDIX C

29 U.S.C. 653 (B)(1)

SEC. 4(B)(1) OF THE "ACT"

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

APPENDIX D

30 U.S.C. 802(D)

30 U.S.C. 802 (H)(1)

30 U.S.C. 802 (I)

§ 802. Definitions:

* * *

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

* * *

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all

authority with respect to the health and safety of miners employed at one physical establishment;

* * *

(i) "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such coal as is usually done by the operator of the coal mine;

* * *

APPENDIX E

30 U.S.C. 803

§ 803. Mines subject to coverage

Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.

As amended Pub.L. 95-164, Title I, § 102(c), Nov. 9, 1977, 91 Stat. 1291.

* * *

APPENDIX F

AGREEMENT BETWEEN HEARTLAND

AND

WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION

ENTERED JANUARY 21, 1991

AGREEMENT FOR OVERLAND HAUL ROAD
HEARTLAND RESOURCES, INC.
LINCOLN COUNTY

THIS AGREEMENT, executed in quadruplicate, made and entered into this 25th day January, 1997, by and between the West Virginia department of Transportation, Division of Highways, hereinafter called "Department", and Heartland Resources, Inc., a corporation, hereinafter called "Heartland",

WITNESSETH, that

WHEREAS, to facilitate its surface mining operations on Bryan Ridge, near the Lincoln County/Logan County line, Heartland desires to construct a bridge over the Guyandotte River, approximately 5.9 miles of haul road and approximately 0.25 mile of access road to a new unit train loadout facility near Atenville in Lincoln County; and

WHEREAS, Heartland desires cooperation of Department in accomplishing the design and construction of the aforementioned Guyandotte River Bridge, haul road and access road, and further desires Department's permission to upgrade certain roads on the Department's State Road System as parts of the haul road and related facilities; and

WHEREAS, Department considers it to be in the public interest to cooperate with Heartland in accomplishing this work since the completed road and bridge is to be conveyed to Department to become part of the State Road System;

NOW, THEREFORE, in consideration of the faithful performance of each party of the mutual agreements hereinafter set forth, Department and Heartland agree as follows:

I. The haul road to be constructed under this Agreement will begin on Lincoln County Route 72 on Bryan Ridge near Heartland's surface mining operation and includes upgrading said Lincoln County Route 72 for approximately 2.4 miles to its junction with Delta Route 43. From this point the new road will be constructed for approximately 3.5 miles across the ridge and down Brown's Branch to Delta over US Route 10, will be improved to its intersection with US Route 10. Further, the road will continue on a new bridge over US Route 10, the Guyandotte River, the mainline CSX Railroad, and Heartland's proposed side track and connect with Delta Route 25 on the east side of the river, including upgrading a portion of Delta Route 25 to Bridge Branch. The alignment of said haul road, hereinafter sometimes called "Project", will be

generally as show on Exhibit "A" attached hereto and made a part hereof.

II. Heartland, or its Contractor(s), shall design and prepare construction plans and related documents, including roadway plans, bridge plans for the Guyandotte River Bridge, right of way plans and plans for the maintenance of traffic as required for the construction of the Project.

The design of the Project shall be in accordance with the Department's standards and criteria and shall be submitted in duplicate to Department for review and approval prior to construction.

Department shall review such submissions promptly upon receipt thereof and subsequently notify Heartland within thirty (30) days of its comments and/or approval. Department's approvals shall be in writing.

III. Heartland shall be permitted to enter upon the Department's right of way of Lincoln County Route 72 to upgrade to aforementioned approximately 2.4 miles of Lincoln County Route 72, and to enter upon the right of way of West Virginia Route 10 in the vicinity of the aforesaid Guyandotte River Bridge site as required to construct the bridge and the approach road from West

Virginia Route 10 to the haul road.

IV. At its expense, Heartland shall acquire or cause to be acquired the required additional right of way required for the construction and future maintenance of the Project; however, Department shall acquire the additional right of way required along Delta Route 25.

V. Heartland shall secure the approvals and/or permits, if any, required by other governmental agencies for the Project.

VI. After receipt of written approval of the Department of the construction plans and related documents and Department's authorization to proceed with the construction, Heartland, or its Contractor, shall construct the Project.

The Project and all related work shall be constructed and performed in accordance with the plans approved by the Department and in accordance with the Department's specifications,

The Department shall be notified of the construction schedule and shall provide construction inspection for the Project, including the Bridge. Should an inspection reveal that the work is not being performed in accordance with the

approved plans and specifications, such fact will be reported by the Department to Heartland for appropriate remedial action. Upon completion of the work, Heartland shall notify the Department that it may make a final inspection thereof. Subsequent to said inspection the Department shall accept or reject the work in writing. Any deficiencies in the construction performed by Heartland which are disclosed by

the Department's inspection shall be promptly corrected by and at the expense of Heartland.

VII. Upon completion of construct of the Project, Heartland shall prepare right of way plans in accordance with the Department's instructions establishing the limits of the required right of way and containing such other pertinent information as the Department may reasonably require. Said right of way plans shall be subject to the approval of the Department.

Heartland shall provide the Department with a reproducible copy of the approved right of way plans and shall convey or cause to be conveyed to the Department all right of way as shown on said plans by proper deeds of conveyance with covenants of special warranty, acceptable to the Department.

Heartland shall not drill or prospect for oil or gas or conduct operations of any nature pertaining thereto within the limits of the Department's right of way.

Heartland shall also release the Department from any and all claims for damage that may be occasioned to the residue of the lands of Heartland by reason of the construction and maintenance of the Project over and across the properties herein conveyed for such relocations.

It is understood and agreed that upon execution, delivery, and acceptance of the aforesaid deeds and fulfillment by Heartland of all of its obligations under this Agreement, Department shall take official action by commissioner's Order to take those portions of the aforesaid haul road not now on the State Route System as part of its State Road System, including the Guyandotte River Bridge.

VIII. Heartland shall keep the presently existing West Virginia Route 10, County Routes and Delta Routes open to traffic in a manner acceptable to the Department and in accordance with the approved maintenance of traffic plans until the construction of the Project is completed and the Project is open to traffic.

IX. Heartland agrees to release, indemnify and save the Department harmless from any and all losses,

damages and liabilities of any nature whatsoever that may result from the construction of the Project and to furnish evidence of having at least the minimum amounts of insurance required of the contractor in Section 103.6 through and including Section 103.6.5 of West Virginia Department of Highways Standard Specifications Roads and Bridges, Adopted 1986. Heartland shall also require its Contractor(s) to have the aforesaid minimum insurance coverage.

As surety to Department for loss or damage it may sustain by reason of entering in this Agreement Heartland shall execute a bond payable to the Department in the amount of $200,000 which amount; however, does not limit then amount of claims that may be made by Department for such loss or damages.

X. Department will hear all costs incurred by it in plan review and construction inspection and related work.

XI. Department will issue permit(s) to Heartland to enter upon the right of way of the Project to perform such future maintenance as may be required to facilitate Heartland's operations and to keep the road in a state condition and open to traffic. All such work shall be subject to Department's approval and other terms and conditions of the permit(s). Heartland shall be responsible for the total cost of such maintenance.

XII. This Agreement shall be binding upon the successors and assigns of each party hereto.

IN WHITNESS WHEREOF, the parties hereto have caused their respective names to be signed by their duly authorized officers.

ATTEST:

/s/ Patricia Crookshanks
Administrative Aide

W. Va. Dept. of Transportation,
Division of Highways:

/s/ Fred Van.....
Commissioner

ATTEST:

/s/ Barbara McDorman
Asst. Secretary

Heartland Resources, Inc., a corporation

/s/ Scott .....
President

ATTEST:

/s/ Barbara McDorman
Asst. Secretary

Seen and Accepted:
Pegasus Resource Co.,
a corporation

/s/ J.M. Davis
Vice President

(To be executived in quadruplicate)

Approved as to FORM this
26th Day of November, 1990
/s/ Frank Sluria
Attorney Legal Division,
West Virginia Department of Highways

Distribution:
Master File
Hartland Resources, Inc.
Roadway Design Division

Exhibit "A"
Heartland
Resources, Inc.
Agreement
Lincoln County

BEST AVAILABLE COPY

APPENDIX G

Excerpts of Agreement Between BBI and Heartland

CONTRACT DOCUMENTS
FOR
GUYANDOTTE RIVER BRIDGE

HEARTLAND RESOURCES, INC.
HARTS, LINCOLN COUNTY, WEST VIRGINIA

JULY, 1990

HEARTLAND RESOURCES, INC.
P.O. BOX 800
WISE, VA 24293
(703) 679-4200

1.0 GENERAL DESCRIPTION

The work will consist of a contract to construct a bridge for transportation of coal to a railroad loadout to be constructed near Harts, Lincoln County, West Virginia.

The contract will consist of the complete design and construction of a vehicular bridge crossing West Virginia State Route 10, the Guyandotte River, and the CSX Railroad at a location near Harts, Lincoln County, West Virginia. Also incuded in this work is the construction of the approach roadways included within the limits of construction.

* * *

BIDDER'S GENERAL INFORMATION

1. You must read and be familiar with the conditions of the proposed contract since its terms affect the work and costs of adminstrations for this contract. Note that you will be required to provide among other requirements, the following:

* * *

(h) Establishment of a complete safety plan and program under the U.S. Coal Mine Health and Safety Act of 1969 and mandatory standards of MSHA (if required by law). Necessary instructions can be obtained upon request and will be sent to the successful bidder.

APPENDIX H

EXCERPTS OF RESPONDENT'S BRIEF

TO THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE Nº 95-4331

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-4331

BUSH & BURCHETT, INC.,
Petitioner

v.

ROBERT B. REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR;
THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,
Respondents

On Petition for Review of an Order
of the Occupational Safety and Health
Review Commission

BRIEF FOR THE SECRETARY OF LABOR

* * *

[6] We agree with petitioner (Br. 16-18) that a proper analysis of whether MSHA exercised its statutory jurisdiction should focus, not on enforcement history, but on the existence vel non of applicable MSHA regulations, and therefore we acknowledge that the ALJ's rather cursory analysis of this issue addressed the wrong question. Ex. B at 12. We also agree (Br. 30-31) that the ALJ erred in relying on Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985) for the proposition that BBI is not covered by the Mine Act because it lacked a "continuing presence" at the site. See Ex. B at 11. However, because, as we discuss, the ALJ properly held that petitioner's work at the bridge site did not take place at a mine subject to MSHA's jurisdiction, these errors are harmless.